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IN THE

Supreme Court of the United States

OCTOBER TERM 1971

No. ~~1078~~ 71-755

MARIO TARABOCCHIA,

Plaintiff,

against

ZIM ISRAEL NAVIGATION CO., LTD.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondent, Zim Israel Navigation Co., Ltd., responding to the Petition for a Writ of Certiorari, respectfully asks this Court to deny the Petition.

Opinions of the Courts Below

The Opinion of the United States District Court for the Southern District of New York is reported at 297 F.Supp. 378. The Court of Appeals for the Second Circuit affirmed the District Court's findings (with a modification not pertinent here) and its Opinion is reported at 417 F.2d 476. The prior decision of this Court (which, *inter alia,* remanded the case to the Court of Appeals) is to be found at 401 US 930. The Opinion of the Court of Appeals, subsequent to the remand, is set forth at 446 F.2d 1375.

Jurisdiction

The jurisdiction of this Court is conceded.[1]

Questions Presented

1. May a plaintiff invoke the maritime doctrine of unseaworthiness when his accident has been caused solely by the negligence of his fellow longshoremen?

2. Should the maritime doctrine of seaworthiness be extended to a structure attached to and a functional part of a pier?

Statement of the Case

The facts of this matter are detailed at length in the Opinion of the District Court (297 F.Supp. 378).

Reasons for Denying the Petition for a Writ of Certiorari

The Respondent submits that the Court of Appeals properly complied with the instructions of this Court in directing a dismissal of plaintiff's complaint. The applicable law, governing accidents of this sort, is clearly set forth in the decision of this Court in *Usner* v. *Luckenbach Overseas Corp.*, 400 US 494.

Petitioner seeks herein to have this Court resolve (what Petitioner contends to be) a conflict among the Circuits. Petitioner avers that this conflict was submitted to this Court for resolution in *Law* v. *Victory Carriers, Inc.*, 5 Cir., 1970, 432 F.2d 376. Since the filing of the instant

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[1] Save for the objections raised *infra* (f'tnte 4, p. 10) that Petitioner, on the state of the record, lacks standing to raise certain of the issues contained in his Petition.

Petition, this Court has decided the *Law* case (40 Law Week 4059) in a manner which completely vitiates Petitioner's assertions.

ARGUMENT

POINT I

Negligence, however labeled, is not synonymous with unseaworthiness.

Petitioner's Brief (p. 13) quotes language from the Opinion in *Usner* v. *Luckenbach Overseas Corp.*, 400 US 494, which lists a brief summary of various conditions under which a vessel might be held to be unseaworthy.

> "A vessel's condition of unseaworthiness might arise from any number of circumstances. Her gear might be defective, her appurtenances in disrepair, her crew unfit. The number of men assigned to perform a shipboard task might be insufficient. The method of loading her cargo or the manner of its stowage, might be improper. For any of these reasons or others, a vessel might not be reasonably fit for her intended service."

The Brief next proceeds to assume a number of conditions which, Petitioner asserts, would have rendered the BEERSHEVA unseaworthy in accordance with the criteria set forth in *Usner*.[2]

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[2] The circumstances hypothesized by Petitioner (Brief, p. 12) are (1) an inadequate number of winchmen in handling the cargo fall; (2) Improper placement of the winch controls; (3) the possibility that the winchman was unsafely operating more than one control; (4) the possibility that no signal system existed or that an inadequate one was being used; and (5) the possibility that the winchman or (winchmen) could not see the objects which were involved in the discharge. These suppositions, advanced for the first time by Petitioner upon this Petition for Certiorari, will be collectively referred to as the New Claims of Unseaworthiness.

It is then argued by Petitioner that the opinion of the Second Circuit Court of Appeals, upon remand from this court, is "devoid of any mention of the above matters." This, avers Petitioner, constituted a failure on the part of the Second Circuit to comply with the requirements of the remand, in that the Second Circuit Court rendered its decision "without considering all the bases of liability for unseaworthiness set forth therein (i.e., in *Usner*)" (Petitioner's Brief, p. 6).

We will prescind momentarily from a consideration of whether or not these hypothesized circumstances (The New Claims of Unseaworthiness) would indeed support the legal conclusion Petitioner now urges. Instead, Respondent respectfully submits that any finding of unseaworthiness posited on a claim of an inadequate number of winchmen, or the lack of winch controls, or whether or not a signal system was in use, etc.—(cf. Petitioner's Brief, p. 12), would, in the light of the judicial history of this suit, have been completely improper whether made by the District Court or by the Circuit Court.

The claims made on Petitioner's behalf by his counsel in the opening to the court were four-fold:

> "Now, we claim, one, that the skid was secured with some old pieces of manila line at the inboard corners.
>
> The Court: I read the memoranda on that, of course. Do you claim that the manila rope was defective as rope or just that it was not sufficient for this particular purpose?
>
> Mr. Heller: That's right, it was not adequate for the purpose for which it was intended, to hold this thing from being carried away.
>
> * * *
>
> Also we claim that there was a space between the skid and the dock proper or the platform and the dock

which permitted this piece of equipment to fall in between.

* * *

We also claim that the cargo sling, that is, the cargo sling used by the men, was improper for this job in that the eye or the loop on it was made by a swaging or collar device which was prone to hang up when being used in this type of operation, hang up and get caught while being dragged or falling. That is three.

* * *

In addition, we claim that the safety net which connected the skid with the ship was not drawn all the way underneath the skid. There was adequate length of safety net to draw underneath the pier." (Pp. 26a-27a Appendix to plaintiff-appellees-appellant's Brief in the Court of Appeals).

Absolutely no contentions of the types set forth on pp. 12-13 of Petitioner's present Brief (The New Claims of Unseaworthiness) were advanced during the course of the trial of this matter.

Furthermore, the record of the trial is unrelievedly barren of even the slightest scintilla of evidence to support these new contentions which Petitioner, for the first time in the entire course of this litigation, now seeks to urge to this Court. Respondent need not rely on its own assertion, nor even indeed on citation to the record. The fact is that Petitioner's Brief candidly concedes that the ". . . record is bare as to a number of matters referred to above" and that "(t)here is no proof . . ." (Petitioner's Brief, p. 12) as to the various innovations we have labeled The New Claims of Unseaworthiness.

What Petitioner now seeks is nothing less than an entirely new trial with an untrammeled option to introduce whatever novel flights of fancy may occur to a litigant who has already had far more than his day in court.

Of course, the complete lack of merit in any such suggestions is only underscored by the equally complete lack of reference by Petitioner to these new matters on the original trial of the action for the District Court. Fortunately, the law protects litigants from having to endure an indefinite series of second, third and fourth contestings of the same lawsuit. Petitioner cannot now be heard to assert that he had available, but did not use, other contentions and other evidence. Petitioner's failure precludes the right to maintain subsequent actions based on asserted positions which he might have taken, but did not. *Cromwell* v. *County of Sac*, 94 US 351, 352; *Commissioner of Internal Revenue* v. *Sunnen*, 333 US 591, 597; *Chicot County Drainage District* v. *Baxter State Bank*, 308 US 371, 375; *M.E. Heiser* v. *Woodruff*, 327 US 726, 735, 736.

Petitioner doubtless realizes the impact of this rule of law. In an attempt to excuse its consequences, Petitioner's Brief strongly implies that Petitioner learned, from the teaching of *Usner*, that those novel contentions he now seeks to make, would be considered unseaworthiness by this Court. Thus, hints Petitioner, he should be accorded another chance in view of what he would say was a novel reworking of the law of unseaworthiness by this Court in *Usner*.

The difficulty with this implied argument is that it is not true. In listing defective gear, unrepaired appurtenances, an unfit crew, an inadequate number of workers, the method of loading cargo or the manner of its stowage, as recognized conditions of unseaworthiness, Mr. Justice Stewart clearly cited existing precedent for each of those hypotheses. Had Petitioner truly desired to assert claims of unseaworthiness of the type recited in the Opinion of Mr. Justice Stewart, he had only to look to existing and well-recognized principles. *Usner* reiterated the principle that negligence, *per se*, is not unseaworthiness. It did not alter or expand at all familiar concepts of what is unseaworthiness.

With regard to those allegations which Petitioner *did* in fact make, the care with which the District Court shaped its opinion discloses the lack of merit in Petitioner's present position. Since the Petitioner had claimed that the skid was a component of the vessel and that the warranty of seaworthiness applied to the skid as well as to the cargo slings, the Trial Court was, perforce, compelled to deal with these two components of the unloading operation. Specific findings were thus made disposing of Petitioner's contentions (made on trial) in respect to the skid (and its appurtenances) and the cargo slings.

The Trial Court expressly found that neither the skid nor any of its appurtenances (the steel shoe, the manila rope, etc.) were so bound up with the ship as to call into play the doctrine of seaworthiness (297 F.Supp. at p. 381). On the other hand, the slings (held by the Court to be an appurtenance of the ship and thus within the reach of the seaworthiness doctrine) were found to have been physically safe, fit and proper for the job at hand (297 F.Supp. at p. 382).

Whether the skid fell because of a condition whose duration is legally significant or whether the same act embraced both negligence and fall, is of no importance now.[3] What is important is that the skid cannot be treated as an appurtenance of the vessel; the sole cause of the happening of this accident was the negligence of one of the Petitioner's co-workers. That negligence cannot be transmutted by semantic prestidigitation into unseaworthiness.

In *Usner* v. *Luckenbach Overseas Corp.*, 400 US 494, —— 27 L.Ed. 2d 562, 567, this Court said:

> "What caused the petitioner's injuries in the present case, however, was not the condition of the ship, her appurtenances, her cargo or her crew, but the

[3] Respondent is in total disagreement with Petitioner's contention that the instantaneous pulling away of the skid rendered the skid unseaworthy, but in the posture of this case, it is unnecessary to engage in any philosophical conjecturings or to draw any metaphysical distinctions between an event and a condition.

> isolated, personal negligent act of the petitioner's fellow longshoreman. To hold that this individual act of negligence rendered the ship unseaworthy would be to subvert the fundamental distinction between unseaworthiness and negligence that we have so painstakingly and repeatedly emphasized in our decisions. In *Trawler Racer,* supra, there existed a condition of unseaworthiness, and we held it was error to require a finding of negligent conduct in order to hold the shipowner liable. The case before us presents the other side of the same coin. For it would be equally erroneous here, where no condition of unseaworthiness existed, to hold the shipowner liable for a third party's single and wholly unforeseeable act of negligence. The judgment of the Court of Appeals is affirmed."

Here, too, the findings of the district court clearly indicate that it was negligence, and only negligence, which caused Petitioner's accident. The law is now clear that negligence and unseaworthiness may not be equated by simply selecting an advantageous label.

POINT II

Maritime law does not apply to a shore connected appurtenance.

Petitioner urges, in Point II, that the warranty of seaworthiness should be brought ashore, i.e., that the skid, being a functional part of the unloading process, should be deemed so much a part of the vessel so as to call into play the warranty of seaworthiness.

When this argument was made by Petitioner to the District Court, it was rejected. The trial court held, citing *Fredericks* v. *American Export Lines,* 2 Cir. 1955, 227 F.2d 450, that a skid (or landing platform attached to the pier) was not a part of the ship within the apprehension of the maritime doctrine of seaworthiness. The trial court

also referred to a very analogous decision in *Penoro* v. *Rederi A/B Disa*, 2 Cir., 1970, 422 F.2d 392.

See also, *Forkin* v. *Furness Withy*, 2 Cir., 1963, 323 F.2d 638.

This finding was undisturbed by the Court of Appeals.

Petitioner now challenges the concept that pier connected equipment should not be deemed a part of the vessel so as to call into play the maritime doctrine of seaworthiness. He adverts to conflicting decisions in various of the Circuit Courts, deplores the disagreement between the Circuits and notes that the question should be resolved by the decision of this Court in the (then) pending case of *Law* v. *Victory Carriers, Inc.*, 5 Cir., 1970, 432 F.2d 376.

Whatever conflict existed between the Circuits on this question has, indeed, now being resolved by this Court. This decision in the *Law* case has been rendered and clearly holds, contrary to Petitioner's arguments:

> "In part, this differential treatment stems from the geographical and historical accident that personal injuries on land are covered, for the most part, by state substantive law while such injuries on navigable water are generally governed by federal maritime law. These two bodies of law do overlap and interpenetrate in some situations, and the amphibious nature of the longshoreman's occupation creates frequent taxonomic problems. In the present case, however, the typical elements of a maritime cause of action are particularly attenuated: respondent Law was not injured by equipment which was part of the ship's usual gear or which was stored on board, the equipment which injured him was in no way attached to the ship, the fork lift was not under the control of the ship or its crew, and the accident did not occur aboard ship or on the gang plank. Affirmance of the decision below would raise a host of new problems as to the standards for and limitations of the applicabil-

ity of maritime law to accidents on land. At least in the absence of explicit congressional authorization, we shall not extend the historic boundaries of the maritime law." *Law* v. *Victory Carriers, Inc.* (Sub. Nom. *Victory Carriers, Inc.* v. *Law*), 40 L. Week 4059, 4063.

Further elaboration is neither necessary nor useful.[4] It has now been decided that the shoreward advance of the unseaworthiness doctrine has been checked and that the ship and the gangway represent the outermost perimeters of its applicability.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

MARTIN J. MCHUGH,
JAMES M. LEONARD,
Counsel for Petitioner.

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[4]Respondent feels it desirable to mention that Petitioner may well be without standing at all to here raise a claim that the skid was part of the vessel even if the *Law* case had been decided otherwise. When Respondent appealed to the Court of Appeals from the decision of the trial court, Petitioner cross-appealed from so much of the district court's opinion as held that the skid was not an appurtenance of the vessel. Respondent, after the Court of Appeals had affirmed the District Court petitioned for Certiorari, Significantly, though Petitioner had previously cross-appealed to the Court of Appeals, he did not then cross-petition with respect to the issue of the skids being part of the vessel.

By familiar law, a failure to preserve an assignment of error on appeal precludes the defaulting party from urging any subsequent consideration of that point in later Appellate proceedings. *Chicago & Eastern Illinois Railroad Company* v. *Southern Railroad Company*, 7 Cir., 1958, 261 F.2d 394, 402; *Haynes* v. *United States, U.S. Court of Claims*, 1969, 418 F.2d 1380, 1382; *Hildreth* v. *Union News Company*, 6 Cir. 1963, 315 F.2d 548, 550.